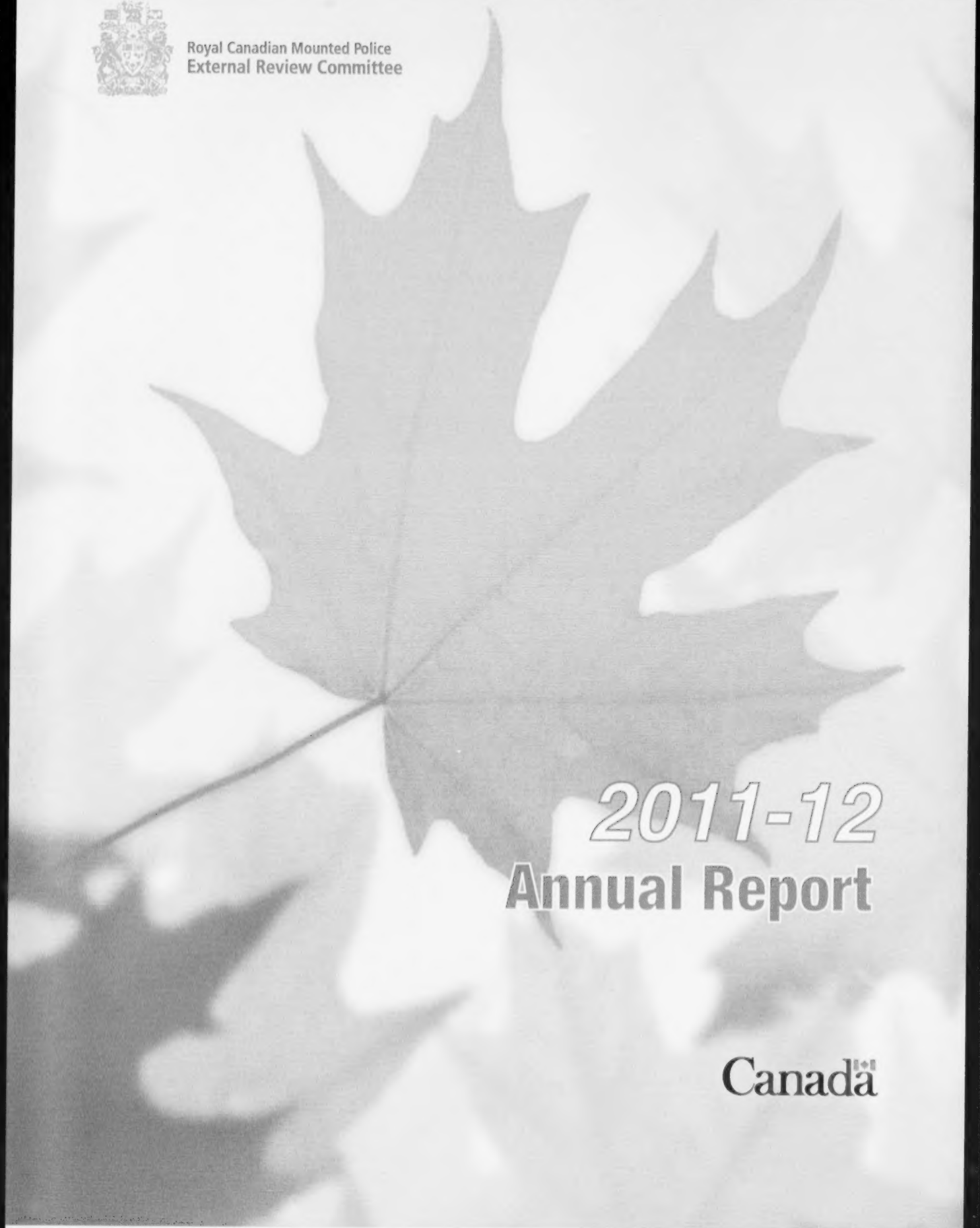
Royal Canadian Mounted Police
External Review Committee



2011-12
Annual Report

Canada

Royal Canadian Mounted Police
External Review Committee

Comité externe d'examen
de la Gendarmerie royale du Canada

June 6, 2012

The Honourable Vic Toews, P.C., Q.C., M.P.
Minister of Public Safety
269 Laurier Avenue West
Ottawa, Ontario
K1A 0P8

Dear Minister:

In accordance with Section 30 of the *Royal Canadian Mounted Police Act*, I am pleased to submit to you the annual report of the RCMP External Review Committee for fiscal year 2011-12, so that it may be tabled in the House of Commons and in the Senate.

Yours very truly,

Catherine Ebbs

Catherine Ebbs
Chair

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PART 1
Message from the Chair

Catherine Ebbs
Chair

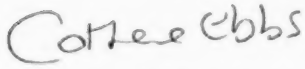
On June 4, 1974, a municipal police service in Southern Ontario summarily dismissed one of its young constables without giving reasons. The decision set in motion a courtroom odyssey that took the constable and the subsequently amalgamated force all the way to the Supreme Court of Canada. There, the Chief Justice wrote for the majority stating that even a probationary police officer is entitled to be treated fairly, not arbitrarily. At the very least, it was pronounced, the officer "... should have been told why his services were no longer required and been given an opportunity, whether orally or in writing...to respond." When the Supreme Court's judgment was eventually applied in 1980, the force was required to conduct a fair hearing and to pay the constable's back wages.

This historic decision affirmed basic principles of fair treatment for all professions in Canada. Subtleties in the law have developed since then, however it is this foundational principle that the ERC has continued to assert for the RCMP. In a transparent way, the ERC upholds administrative fairness in RCMP decision-making to assure Canadians that the RCMP is accountable.

In addition to disciplinary matters, the ERC has conducted similar reviews of members' grievances about management decisions. The RCMP has been under much scrutiny of late for its handling of its members' harassment grievances. It is noteworthy that this is a topic that has been a challenge for a very long time. In the ERC's first review of such a grievance in 1994, the Acting Chair wrote, "All police employers must be aware today, and be sensitive to the fact that times are changing and that the rough and ready speaking and

supervisory styles, which may once have been common in the ranks, are perhaps becoming a thing of the past."

As the RCMP proceeds on its path to transforming itself into a modern police service that provides its members a climate of respect and professionalism, the ERC will continue to uphold the foundational principles that Canadians expect.



Catherine Ebbs
Chair

PART II
Who We Are and What We Do

In 1976, The *Commission of Inquiry Relating to Public Complaints, Internal Discipline and Grievance Procedure Within the Royal Canadian Mounted Police* recommended that there be independent review of RCMP labour relations matters. This would ensure that RCMP labour relations systems were as fair and equitable as possible, and perceived to be so by members of the Force. It also concluded that independent reviews were vital to a system *"which would have the respect of those members most likely to have an occasion to resort to it"*.

The RCMP External Review Committee (ERC) is the independent federal tribunal established by Parliament over twenty years ago to carry out the independent reviews recommended by the 1976 Commission of Inquiry.

The ERC reviews certain types of grievances, as well as disciplinary appeals, and discharge and demotion appeals. Its jurisdiction is restricted to regular and civilian members only. Public servants employed by the RCMP have separate labour relations processes.

As a quasi-judicial tribunal, the ERC applies the rule of law, and its role is crucial to ensuring transparency, fairness, and impartiality in RCMP labour relations processes. Once the ERC reviews a case, it issues findings and recommendations to the RCMP Commissioner, who then makes the final decision.

The ERC helps to maintain fair and equitable labour relations within the RCMP. Over the years, its findings and recommendations have prompted the RCMP to make policy changes in many areas of its internal labour relations, including medical discharges, suspensions without pay (SWOP), harassment prevention, relocation and transfer allowances, and workforce adjustment.

As one of two bodies which oversee the RCMP (the other being the Commission for Public Complaints Against the RCMP), the ERC has an important function in maintaining public confidence in the RCMP by helping to ensure that the RCMP respects the law and human rights in labour relations.

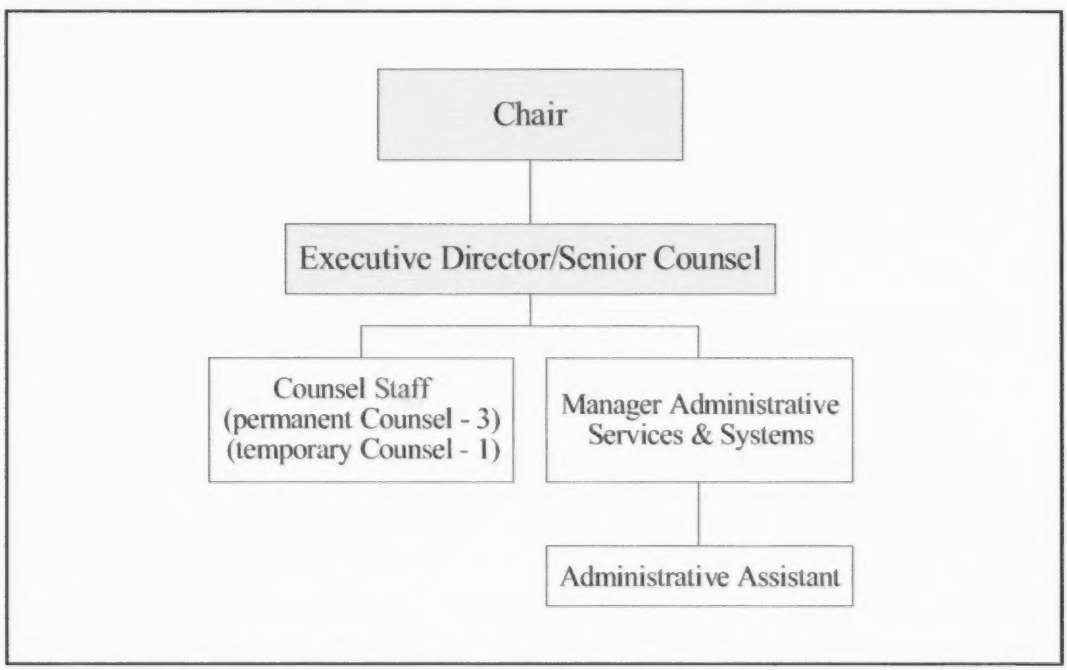
In 2011-12, the ERC's budget was approximately $1.9 million, and it began the year with a staff of eight, including the Chair. The ERC spent approximately 90% of its time and resources on case review, and 10% on outreach and communication. Corporate services such as financial management, human resources and information technology services are included in these two sets of activities.

Organizational Structure

The ERC reports to Parliament through the Minister of Public Safety. It is headed by a Chair who is appointed by order of the Governor in Council. The Chair is also the Chief Executive Officer. Under the *Royal Canadian Mounted Police Act* (*RCMP Act*), no one who is appointed to the ERC can be a member of the RCMP.

In addition to the Chair, the ERC is managed by an Executive Director/ Senior Counsel who oversees a staff of six. The staff is comprised of lawyers who are experts in labour, employment and administrative law. It also includes a small number of administrative personnel who ensure the day-to-day operations of a modern public institution.

The ERC receives some support services from the Department of Public Safety through a Memorandum of Understanding for assistance in



such areas as Human Resources, Information Technology, and Finance. As for all federal public service departments, the department of Public Works and Government Services Canada provides the ERC with all accommodation services.

Case Review Process

The ERC does not have authority to initiate reviews. The case review process starts when the RCMP Commissioner refers a case to the ERC. The types of cases that must be referred to the ERC are described in the *RCMP Act*. They include certain categories of grievances that are outlined in the *RCMP Regulations*, as well as all disciplinary appeals, and all discharge and demotion appeals.

When the ERC reviews a case, it examines the entire record, including all supporting documentation, the decision made, and the submissions of the parties. Where the review involves the appeal of a disciplinary decision, or a discharge and demotion decision, the transcript of the hearing, as well as any exhibits entered at the hearing, are also before the ERC. The ERC Chair may request that one or both parties provide additional information or submissions. If information is received from a party, the other party is given the chance to respond. The Chair also has the authority to hold a hearing if deemed necessary, although this option is rarely exercised. The Chair considers all of the evidence, legal issues, relevant legislation, and case law before making findings and recommendations.

The ERC Chair provides the findings and recommendations to the RCMP Commissioner and the parties involved. The Commissioner is the final decision-maker, and must consider the ERC's recommendations. If the Commissioner does not follow the ERC's recommendations, the *RCMP Act* requires that the Commissioner's decision include the reasons for not doing so.

The grievance, discipline, and discharge and demotion processes, and the ERC's role in each, are examined more closely below.

Grievance Process

The *RCMP Act* provides that disputes involving personal rights and interests are to be resolved through the RCMP grievance process. Grievances can cover a broad range of rights and interests, from entitlements to claim reimbursement for certain expenses, to the right to work in an environment free from harassment and

Five types of grievances which must be referred to the ERC for review:

(a) the Force's interpretation and application of government policies that apply to government departments and that have been made to apply to members;

(b) the stoppage of the pay and allowances of members made pursuant to subsection 22(3) of the *Act*;

(c) the Force's interpretation and application of the *Isolated Posts Directive*;

(d) the Force's interpretation and application of the *RCMP Relocation Directive*; and

(e) administrative discharge for reasons of physical or mental disability, abandonment of post, or irregular appointment.

discrimination. Grievances represent the greatest number of cases referred to the ERC.

An RCMP officer designated as a Level I Adjudicator initially considers and decides a grievance. If the grieving member is dissatisfied with the Level I Adjudicator's decision, the member may file a Level II grievance which is decided by the RCMP Commissioner or designate. Under section 36 of the *RCMP Regulations*, before making a decision, the Commissioner must first refer to the ERC for its review, grievances which fall under five specified categories, unless the Commissioner grants a member's rare request to not do so.

Disciplinary Appeals Process

When an RCMP member is alleged to have committed a serious violation of the RCMP *Code of Conduct*, and formal discipline is initiated, an internal hearing is held to determine whether or not the allegations are established, and if so, what the appropriate sanction will be. The matter is heard by an Adjudication Board consisting of three senior RCMP officers. If, after the Board renders its decision, either the Force or the member wishes to appeal that decision to the RCMP Commissioner, then the Appellant and the Respondent provide written submissions to the Commissioner. Unless the Commissioner grants a member's rare request to not do so, the Commissioner refers the file to the ERC for its review. Once the ERC has conducted a thorough

review of the file, it issues its findings and recommendations to the Commissioner and the parties involved.

Discharge and Demotion Appeals Process

A discharge or a demotion proceeding may be initiated against a member for failing to perform his/her duties in a satisfactory manner. When this happens, the member may request that a Discharge and Demotion Board, consisting of three senior officers of the RCMP, be convened to review the matter. The decision of the Board may be appealed by either the member or the Appropriate Officer who initiated the proceeding.

Appeal submissions are made in writing to the RCMP Commissioner. Unless the Commissioner grants a member's rare request to not do so, the Commissioner refers all discharge and demotion appeals to the ERC for its review. Once the ERC has conducted a thorough review of the file, it issues its findings and recommendations to the Commissioner and the parties involved.

Outreach and Communication

In addition to case reviews, the ERC engages in other activities that support and enhance its core mandate. Outreach and communication, in a variety of forms, is an important component of its work.

The ERC publishes the quarterly *Communiqué*, which includes case summaries and articles on issues that commonly arise in cases.

The ERC also maintains a website (www.erc-cee.gc.ca) which contains, among other things, Annual Reports, its quarterly newsletter *Communiqué*, an extensive searchable database of summaries of the ERC's findings and recommendations, summaries of RCMP Commissioners' subsequent decisions, and the ERC's most requested articles, discussion papers and specialized reports. The ERC has received positive feedback from its website users about its accessibility and utility. In this past year, the ERC recorded 317,875 page views on its website.

The ERC provides information and training to various labour relations personnel within the RCMP. Outreach initiatives have included

Topics of ERC's most requested articles:

- **Referability:** A discussion concerning the Committee's jurisdiction to review matters
- **Standing:** Recent Developments - the "Standing" Requirement
- **Standing:** Subsection 31(1) of the *RCMP Act*: the "Standing" Requirement
- **Time Limits:** Subsection 31(2) of the *RCMP Act*: Time limits
- **What Makes a Good Grievance?**

Other papers are listed on the ERC's website at www.erc-cee.gc.ca

visits with RCMP members in detachments, National Headquarters, and Divisional Headquarters. The ERC tries to combine these visits with other travel whenever possible. During these information and training sessions, the ERC routinely addresses procedural difficulties or questions which commonly arise in grievance and appeal matters. This helps to encourage a better understanding of the importance and practical function of adhering to proper procedures.

Actual Quote from Reader:

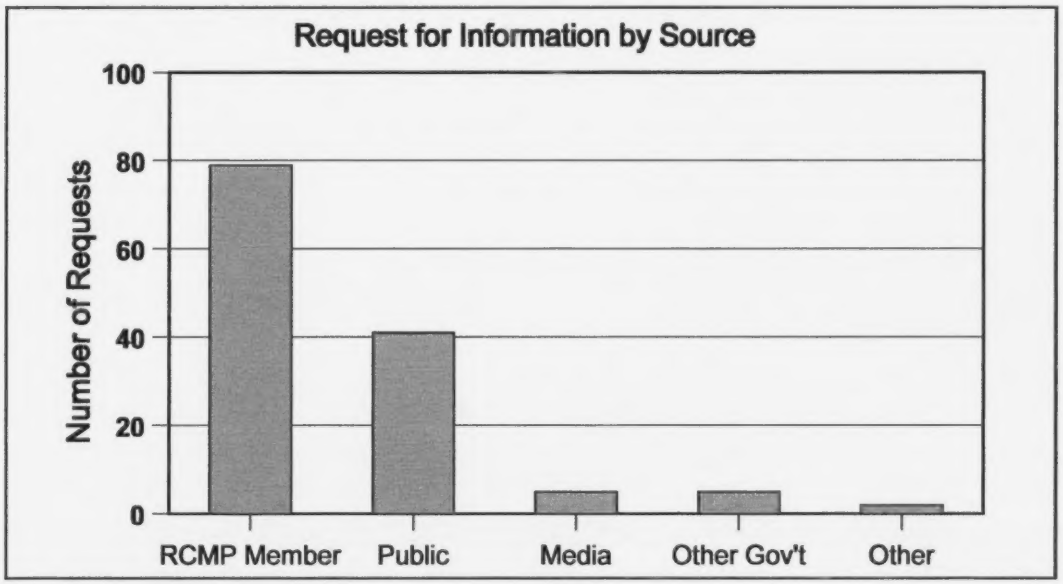
"I am taking this opportunity to tell you how much your article is an excellent example of plain language and simplification of a legal principle – it is so clear. I wish I could have had this article when studying the* Charter *or administrative law."

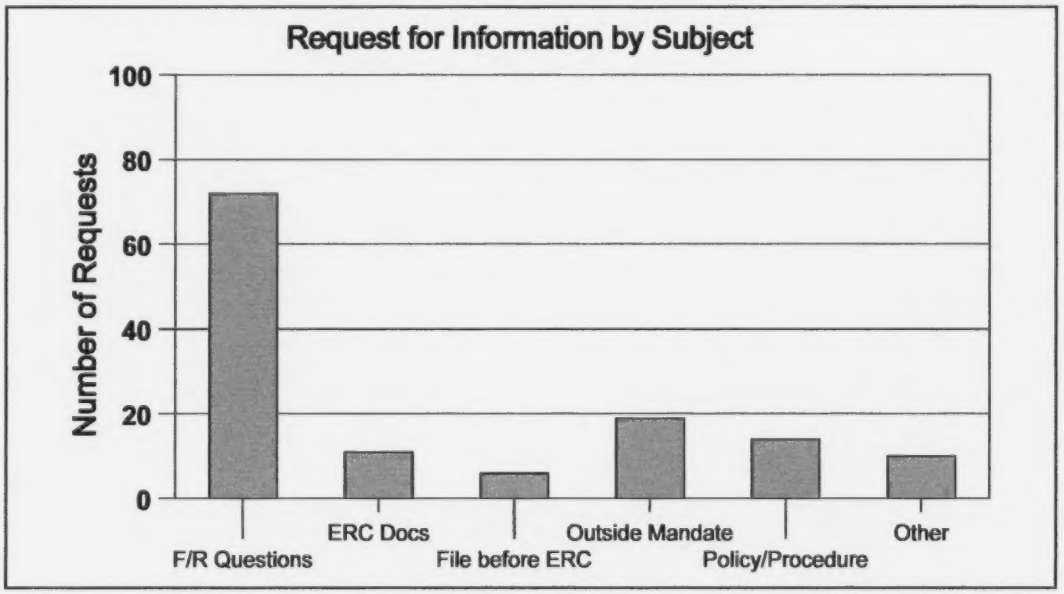
Requests for Information

The ERC also responds to formal and informal requests for information. In 2011-12, the ERC received a total of 133 requests. On average, the ERC provided an answer to each request within two days. Just under two-thirds of the requests came from the RCMP itself. Members of the public were the second largest group of requesters.

The graphs below illustrate the general categories of requests received and their sources. Several requests were straightforward and requesters were provided with a timely response or were re-directed to the appropriate

office. However, other requests were complicated and required more time and effort for a complete and accurate response. By far, the median response time was the same day, indicating that a smaller number of complex inquiries were significantly time-consuming.



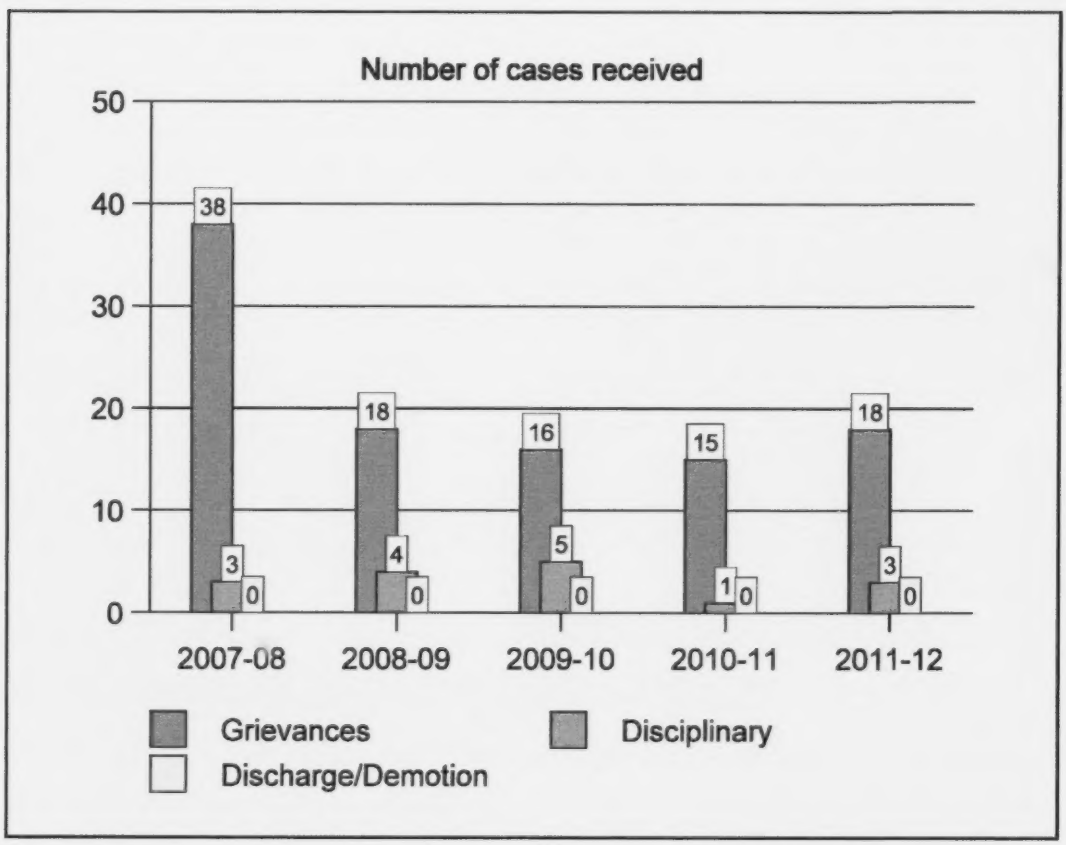


PART III
What We Did This Year

Case Review

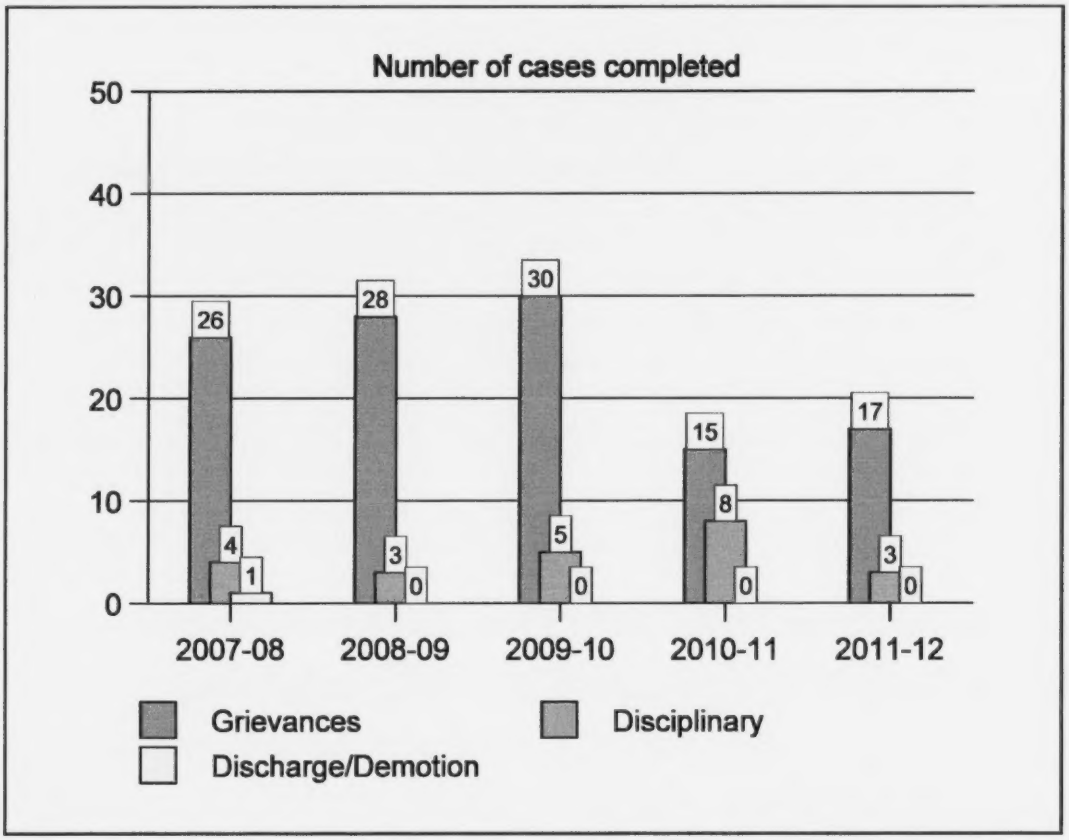
Referrals

Twenty-one case files were referred to the ERC in 2011-12: 18 grievances and 3 disciplinary appeals. The ERC received no referrals of discharge and demotion appeals this year.



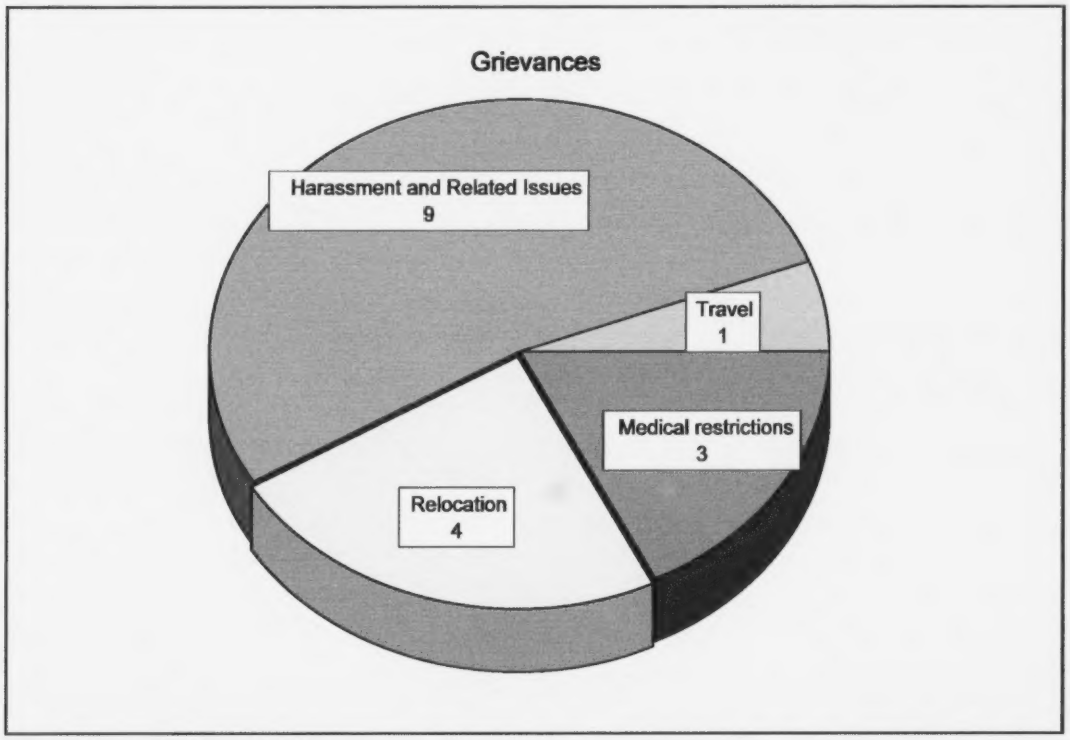
Cases Completed and Recommendations Issued

The ERC completed 21 cases in 2011-12: 17 findings and recommendations were issued regarding grievances and three were issued regarding disciplinary appeals. One case was withdrawn before the ERC could issue its findings and recommendations. The ERC did not issue any findings and recommendations in discharge or demotion cases this year.



Grievance Reviews

The chart below shows the distribution of this year's grievance recommendations by subject matter.



In the last few years, travel, harassment, and relocation issues accounted for a significant portion of grievance reviews. In 2011-12, harassment issues were still prominent and represented approximately half of all the grievance recommendations issued.

Disciplinary Appeals

This year, the ERC reviewed and made recommendations in three disciplinary appeals. All were initiated by the member. Two involved a sanction consisting of an order to resign within 14 days or be dismissed from the Force. The other one involved a forfeiture of pay, a reprimand and counselling. The ERC recommended that two appeals be allowed (D-121, D-122) and one be dismissed (D-123).

Processing

For grievances, the ERC's objective is to issue its findings and recommendations within three months of the case being referred to it. For discipline and discharge and demotion cases, it strives for a standard of six months. These service standards are not currently being met. The ERC continues to pursue avenues for a permanent resource allocation that will allow it to reach and sustain an acceptable review rate.

At the start of 2011-12, 39 grievances and appeals were pending before the ERC. At the fiscal year end of 2011-12, there were 47 cases before the ERC for review. They were distributed as follows:

- 42 pending grievances;
- 5 pending disciplinary appeals; and
- 0 pending discharge and demotion appeals.

Other Activities

In addition to its case review function, the ERC must meet every statutory obligation required of all departments in the Public Service. The ERC is fully committed to delivering on its mandate, while ensuring compliance with legislation and policy.

The ERC's workload includes disproportionately significant reporting and corporate requirements. The ERC has few staff members who are involved in the collection, analysis and reporting of its corporate data to the central agencies that oversee the various aspects of management. As a result, these staff members are called upon to become the ERC's subject matter experts for a number of different areas including procurement, finance, human resources and knowledge management. These staff members assume many roles to address corporate management demands in order to meet the same reporting requirements of large departments and agencies. The ERC also uses a variety of external consultants to ensure that it thoroughly meets all of its obligations. Given the ERC's small size and budget, these reporting pressures take combined human and financial resources away from the case review process.

PART IV
Highlights of This Year's Cases

As a quasi-judicial tribunal, when reviewing grievances and disciplinary appeals, the ERC applies the rule of law and is guided by the principles of fairness, impartiality, independence, and transparency, not unlike a court of law. The ERC is a recommending body. It issues findings and recommendations the same way that an adjudication body issues decisions.

The following sections highlight some of the grievances and disciplinary appeals that the ERC reviewed this year.

Grievances

Under Part III of the *Act*, a member may submit a grievance if he or she is aggrieved by a decision, act, or omission that is made in the administration of the affairs of the Force. The ERC reviews certain categories of grievances after a RCMP Level I Adjudicator has issued a decision on the matter. In so doing, the ERC considers preliminary issues such as adherence to time limits, standing to grieve, sharing of information, and admissibility of evidence. It also examines the substantive elements of a grievance. These can include, for example, a member's right to claim a benefit and the extent to which an accommodation request was properly addressed.

The ERC considered a number of procedural and substantive issues this year, as discussed below.

Limitation Periods

Members have a broad right to grieve. However, it is subject to limitation periods. A limitation period is a precise time frame during which a grievance can be initiated. If a member does not raise a particular grievance within that time span, then his or her ability to do so may be lost.

Limitation periods are very important. They are designed to make sure that a grievance is dealt with while evidence is available, and memories are fresh. They also help guard against belated and unexpected legal battles. This allows potential parties to move on with their work and lives.

Subsection 31(2)(a) of the Act sets out the limitation period for presenting an initial grievance. It provides:

> *31(2) A grievance under this part must be presented*
>
> *(a) at the initial level in the grievance process, within thirty days after the day on which the aggrieved member knew or reasonably ought to have known of the decision, act or omission giving rise to the grievance; ...*

There is a further statutory limitation period for launching a grievance at "*any succeeding level*".

The *Commissioner's Standing Orders, Grievances* (SOR/2003-181) and the Force's Grievance Policy reinforce these limitation periods. They also elaborate them by detailing the measures to be taken to ensure a timely grievance.

In ***G-524***, the ERC emphasized that limitation periods are compulsory. That matter concerned a member who sought a reimbursement of certain relocation expenses. The Force refused his request. It asserted that the monies claimed were payable only in exceptional circumstances, which purportedly did not exist. When the Member learned this, he conveyed dissatisfaction, vowed that he would be taking things further, and spoke with various officials. Yet he did not grieve the decision until between 33 and 38 days after he learned about it.

The Level I Adjudicator dismissed the grievance. She reasoned that it was raised outside the limitation period. The ERC agreed. It recommended that the grievance be denied. In so doing, it recognized the perceived unfairness of strictly enforcing a 30-day limitation period when other steps in a grievance process can sometimes take much longer. However, it explained that the limitation period was mandatory, that the Member did not comply with it, and that the RCMP had to follow the law.

Given that limitation periods for submitting a grievance are mandatory, it is vital that members be familiar with the authorities that govern such periods. The ERC touched on this point in ***G-518*** to ***G-520***. Those cases involved a grievor who tried to have a member disciplined for alleged inappropriate acts. He was unsuccessful. The following year, the Grievor became aware that he could have grieved the member's activities. He then mounted grievances to that effect.

The Level I Adjudicator rejected the grievances. He explained that they were submitted months after the statutory limitation period expired. The Grievor disagreed. He thought his grievances were timely because he presented them within 30 days of being advised of his ability to grieve. The ERC found that the grievances were out of time, and recommended that they be denied. It stressed the principle that members are expected to become familiar with grievance authorities, and indicated that the Grievor did not take time to do this until months after he was aggrieved.

Part of the familiarization process involves becoming able to identify the point in time at which the limitation period for a grievance begins. In ***G-509***, the ERC considered when the Grievor "*reasonably ought to have known of the decision, act or omission giving rise to the grievance*".

The Grievor was a successful candidate in a promotion process. In order for him to finalize the process, he had to move to the area where the promotional opportunity was located. He asked for accommodation in a government-owned house in that region. The Force advised him that it could not give him one. Roughly three months later, the Grievor withdrew from the promotion process. He stated that his inability to secure a government-owned house prevented him from moving. Within the next 30 days, he grieved the Force's failure to provide him with such a property. The Level I Adjudicator dismissed the grievance on the basis that it was submitted outside the limitation period.

The ERC agreed. It reasoned that the limitation period started when the Force declined to give the Grievor government housing, not when the Grievor left the promotion process three months later. That was well over 30 days after he reasonably ought to have known he was aggrieved.

Extensions

Although Parliament made the limitation periods for grieving mandatory, it recognized that there can be good reasons for extending them, even retroactively. This is why subsection 47.4 of the *Act* exists. It permits the Commissioner of the RCMP to extend limitation periods, either by request or on his or her own initiative, if (s)he thinks that doing so is justified. RCMP Grievance Policy delegates to Level I Adjudicators authority to extend the limitation period in subsection 31(2)(a) of the *Act*.

No single factor is determinative when considering if an extension is appropriate. The ERC has historically recommended that extensions be given in differing circumstances, for an assortment of reasons. This year, it addressed two extension requests, in ***G-522*** and ***G-524***, by applying a four-part test which was recently highlighted by the Federal Court of Canada (FCC) in *Canada (A-G) v. Pentney*, 2008 FC 96. Specifically:

1. Did and does the grievor have a continuing intention to pursue the grievance?
2. Does the subject of the grievance disclose an arguable case?
3. Is there a reasonable explanation for the grievor's delay?
4. Would allowing the extension prejudice the responding party?

In accordance with the FCC's direction, this test is designed to be "*adaptable*" and "*contextual*", and to make sure that justice is done. As a result, it promotes a broader and more methodical analysis than prior approaches. This benefits parties by giving them a clearer idea as to how to support, or refute, an assertion that an extended limitation period is warranted.

In ***G-522***, the Force denied the Grievor's claim for relocation house-hunting costs. The Grievor filed a grievance shortly after the time limit elapsed. He later said that he was not immediately advised of his right to grieve, and that he chose to delay grieving until all his other options ran out. He also repeatedly refined his position as to when the limitation period began. The Level I Adjudicator dismissed the case as untimely. He then held that an extension was not justified.

The ERC applied the *Pentney* test, and agreed with the Adjudicator. It accepted that some factors favoured an extension. For instance, the record showed that the Grievor always meant to grieve. Moreover, his minor delay in grieving did not prejudice the Respondent. Yet the ERC found that his failure to reasonably explain his delay in grieving was vital in this case. It urged that allowing an extension would not be just, given that the Grievor's rationales either revealed a complete unfamiliarity with the most basic parts of grievance policy, or were unsubstantiated.

The ERC applied the test again in ***G-524***. It reached a similar conclusion based on somewhat different findings. In that grievance, the RCMP declined the Grievor's request for monies on the ground that the exceptional circumstances in which they could be paid were not

present. The Grievor did not grieve until a few days after the time limit expired. He essentially argued that, in his own opinion, the situation in which he was seeking a payment was exceptional. The Level I Adjudicator denied the matter as untimely. He then held that an extension was not appropriate.

The ERC agreed. It again noted that the Grievor's intention to grieve, and the lack of prejudice to the Respondent favoured an extension. However, it found that those things were outweighed by more significant factors in the circumstances. First, the Grievor failed to reasonably explain why he presented a late grievance. Second, the case was not clearly arguable, as he did not appear to meet the onus of illustrating that his was one of the rare instances in which the Force had to pay the funds requested. The absence of crucial documents fortified those findings.

Harassment

The Treasury Board's *Policy on Prevention and Resolution of Harassment in the Workplace* describes the concept of workplace harassment, as follows:

> *[A]ny improper conduct by an individual, that is directed at and offensive to another person or persons in the workplace, and that the individual knew or ought reasonably to have known would cause offence or harm. It comprises any objectionable act, comment or display that demeans, belittles, or causes personal humiliation or embarrassment, and any act of intimidation or threat. It includes harassment within the meaning of the Canadian Human Rights Act.*

The RCMP's Harassment Policy contains a similar definition.

Regrettably, workplace harassment is more prominent than many would like to believe. The RCMP workplace is no exception. This is highly unfortunate. On an individual level, those who suffer, or are accused of harassment can experience high stress, poor concentration, feelings of social isolation, lost self esteem, anxiety disorders, depression, sleep issues, and a host of other consequences. On an organizational level, entities plagued with harassment issues must often absorb the human and financial costs associated with poor employee health, low morale, reduced efficiencies, increased absenteeism, turnover, negative publicity, and legal actions.

In an official statement dated November 16, 2011, the newly-designated Commissioner of the

RCMP made it very clear that addressing harassment within the Force would be "*first on my plate*". He added that he will work hard to "*ensure that RCMP employees can thrive in a healthy, productive and harassment free environment*". The ERC supports that aim. This year, it made a number of recommendations to help the Force achieve its goal of providing a harassment-free workplace.

In ***G-510*** and ***G-511***, the ERC reasserted the test for determining if harassment has occurred. The Grievor filed harassment complaints against a member who he said belittled him, wrongly relieved him of his duties, left him a disturbing message, and signed an offensive letter about a situation in which he was involved. The Respondent reviewed the complaints through the prism of a "*fully informed employee/ manager, similarly situated to [an alleged harasser] who is aware of the Force's Mission, Vision and Values, the appropriate policy statements and directions on the issue of harassment*". He decided that this person would deem the complaints unfounded.

The ERC found that the Respondent applied a test that was wrongly framed, and that contained too many qualifiers. It explained that he should have asked if an "*informed reasonable person*" (as opposed to an informed reasonable person looking at the issue from an alleged harasser's perspective) would find that the allegations constituted harassment. The ERC pointed out that such a test was broader and clearer than the test administered by the Respondent. Moreover, it was more consistent with the test set out in a key Treasury Board guidance document, and in prior case law. For these and other reasons, the ERC recommended that the Commissioner of the RCMP allow the grievances, and return the complaints to be dealt with according to applicable policies.

In ***G-508***, the ERC identified some factors which should <u>not</u> form part of an analysis of whether harassment took place. The Grievor was a target in numerous workplace incidents. His car, office, food, and equipment were tampered with. He was repeatedly insulted. Pornography was left in his office. He was also threatened with violence. He did not know who was behind most of the incidents. They continued even though he advised superiors of them. He became upset, and started going into "*dry heaves*" before work. He submitted a harassment complaint.

Following an investigation, the Respondent determined that none of the incidents amounted to

harassment. He provided three reasons. First, practical jokes had been very common in the detachment, and were not directed at any one person. Second, the Grievor could not identify those responsible for the incidents. Third, witnesses said none of the incidents were malicious.

The ERC took a different view. It deduced that the informed reasonable person would conclude that what went on represented harassment. The Grievor experienced demeaning, humiliating, and threatening actions which he unsuccessfully tried to get superiors to stop. This caused him undisputed harm. The ERC clarified that it did not matter if others were treated similarly, if no culprit was identified, or if the acts were not meant to be malicious. The incidents represented harassment, and had to be dealt with. The ERC recommended that the grievance be allowed.

Finally, the ERC noted that while workplace harassment is a very broad concept which captures a wide range of things, not every indelicate statement, or misjudgment, will fall within its scope.

For example, in ***G-514***, a male member jokingly told two other male members during a golfing event to "*stop behaving like a couple of old women*". A female member overheard this and felt it amounted to harassment. She filed a grievance. The ERC found that although the comment was tactless, an informed reasonable person would not believe that it represented harassment. This was so because it did not comprise a type of behaviour sanctioned by harassment policies. Furthermore, the evidence indicated that it was neither degrading nor objectionable. The ERC nevertheless noted that some acts or words intended to be private may constitute harassment.

In ***G-515***, the Grievor overheard other members making critical, but general comments about perceived misuses of the Force's sick leave and return to work programs. She was using both programs at the time. In her view, the statements amounted to harassment. The ERC did not agree. In applying the objective reasonable person test, it found that while the remarks were improper, the evidence showed that they were neither derogatory, objectionable, nor directed at the Grievor. Moreover, those who uttered them never named names. The ERC pointed out that it was inappropriate to discuss internal RCMP personnel issues in a public setting.

Disciplinary Appeals

The ERC reviews appeals from decisions of RCMP disciplinary adjudication boards (boards) to ensure that hearing processes are fair, and that boards do not err in making findings. Boards are required to hold hearings to decide whether allegations of misconduct have been proven, and if so, to determine the sanction(s) that should be imposed. In so doing, boards must act fairly. This duty arises from common law principles of fairness and certain provisions in the *Act*. Where allegations are established, a board imposes sanctions that can range from a reprimand to dismissal from the Force. In deciding on an appropriate sanction, a board will assess many factors. These include sanctions imposed in similar cases, and a member's record of discipline.

The ERC considered some interesting disciplinary issues this year. They are highlighted below.

Reading a Prepared Oral Decision from a Laptop

In ***D-123***, the ERC was asked to examine the way in which the Board rendered an oral decision. Following the final submissions on the allegations, the Board adjourned for roughly three hours. When it re-entered the hearing room, the Chair appeared to read from his laptop the Board's decision that various allegations had been proven. On appeal, the Member contended that the Board could not have made a decision and prepared typed reasons in so short a period. In his view, the Board pre-judged and decided the case before the hearing was over. He argued that this was a breach of procedural fairness. He accordingly felt the decision should be set aside.

The ERC concluded that the Member did not defeat the presumption that the Board acted fairly. It acknowledged that it is important for decision-makers to avoid reaching conclusions until after hearing all the evidence and considering final submissions. It added that it is also vital for there to be no appearance that a decision was made too early. Yet it found that certain preparatory work can be done as a hearing progresses. This can include summarizing testimony, reviewing general principles, and typing notes, so long as the Board keeps an open mind while so doing.

As a result, the ERC determined that it was quite possible for a board to adjudge a matter objectively despite doing precursory work during a hearing, and reading an oral decision from a laptop. This was especially so in this case, where, during its oral

decision, the Board weighed evidence, reviewed submissions, referred to witness accounts, balanced conflicting testimony, discussed applicable legal principles, and clearly explained its findings. The ERC recommended that the appeal be dismissed.

Holding Proceedings in the Language of the Appellant's Choice

Part III of the *Official Languages Act* (the *OLA*) provides for the use of official languages before federal courts and tribunals, including boards. It stipulates that any person may use English or French in a proceeding. As a result, every board member who hears a proceeding must be able to understand the language in which the parties have chosen to proceed, without help. Lastly, a board must provide facilities for the simultaneous interpretation of a proceeding, upon request.

In ***D-122***, the ERC examined whether a board's official languages practices breached the Appellant's right to a fair hearing. The Appellant had requested that his hearing be held in English. He argued that the Board trammeled his rights by communicating with Counsel on the record, and permitting Counsel to examine French speaking witnesses, in French.

The ERC determined that the Board did not breach the Appellant's right to procedural fairness. It explained that it was reasonable to allow Counsel to examine French-speaking witnesses in French, given that simultaneous translation was provided. It also noted that the Board was aware of its obligation to maintain proceedings in English despite the presence of simultaneous translation services. Occasional translation issues were addressed without objection.

Deference to Factual Findings

The Commissioner of the RCMP generally owes deference to a board's factual findings. This means that (s)he is normally expected to yield to, or avoid disturbing those findings. However, if a board makes a "*manifest and determinative error*", the Commissioner may interfere with, and replace a finding of fact. A manifest and determinative error may be described as a mistake which is so evident and far-reaching that it justifies intervention. The ERC identified such an error in ***D-121***.

In that matter, the Appellant, while off-duty, met the Complainant at a private party. He then allegedly "*engaged in sexual relations with her without her consent, thereby committing a sexual assault*". The Complainant

declared that the sexual activity could not have been consensual. She explained that she had been secretly slipped a drug. The Appellant insisted that the sexual relations were consensual, and that the Complainant had not been drugged.

The Board described the Complainant as a credible witness despite finding that there were inconsistencies in her testimony and prior statements. Then, contrary to an expert witness's testimony, it found that she had unknowingly ingested a drug. It consequently reasoned that she could not have consented to sexual activity. The Board determined that the purported assault was proven, and that it had been enabled by the concealed administration of a drug, with the Appellant's knowledge. It ordered the Appellant to resign from the Force, or be dismissed.

The ERC found that the Board made a manifest and determinative error when it ruled that the Complainant was covertly given a drug. The Board did not have good reasons for discounting expert witness testimony to the contrary, or treating the Complainant as a credible witness, and the evidence did not otherwise support its conclusion. Since the Board's error influenced all of its other conclusions, the ERC recommended that the Commissioner of the RCMP allow the appeal, find that the allegation was not established, and make the determination the Board should have made.

Deference to Sanction

The Commissioner owes substantial deference to a board's findings on sanction. Intervention will be warranted only where a considerable error(s) occurs. For example, an error of principle, a failure to consider an important mitigating factor, a consideration of an irrelevant aggravating factor, or a result in which a sanction is clearly out of balance may justify allowing an appeal on sanction. In ***D-122***, the ERC found that the Board made several of these types of mistakes.

In that matter, the Board found that the Appellant misused personal medical and other confidential data through deceit to seduce the vulnerable spouse of a member whose position reported to him. The Board ordered the Appellant to resign, or be dismissed within 14 days.

The ERC determined that a number of significant errors had led to a disproportionate sanction. Specifically, the Board gave insufficient weight to expert opinion, as well as to

the Appellant's performance history. It used an improper test. It erred in the way it made key findings. Moreover, its penalty was inconsistent with penalties in similar cases. The ERC recommended that the Commissioner of the RCMP vary the sanction to a reprimand and a forfeiture of 10 days' pay.

Overview of ERC Recommendations, 2011-2012

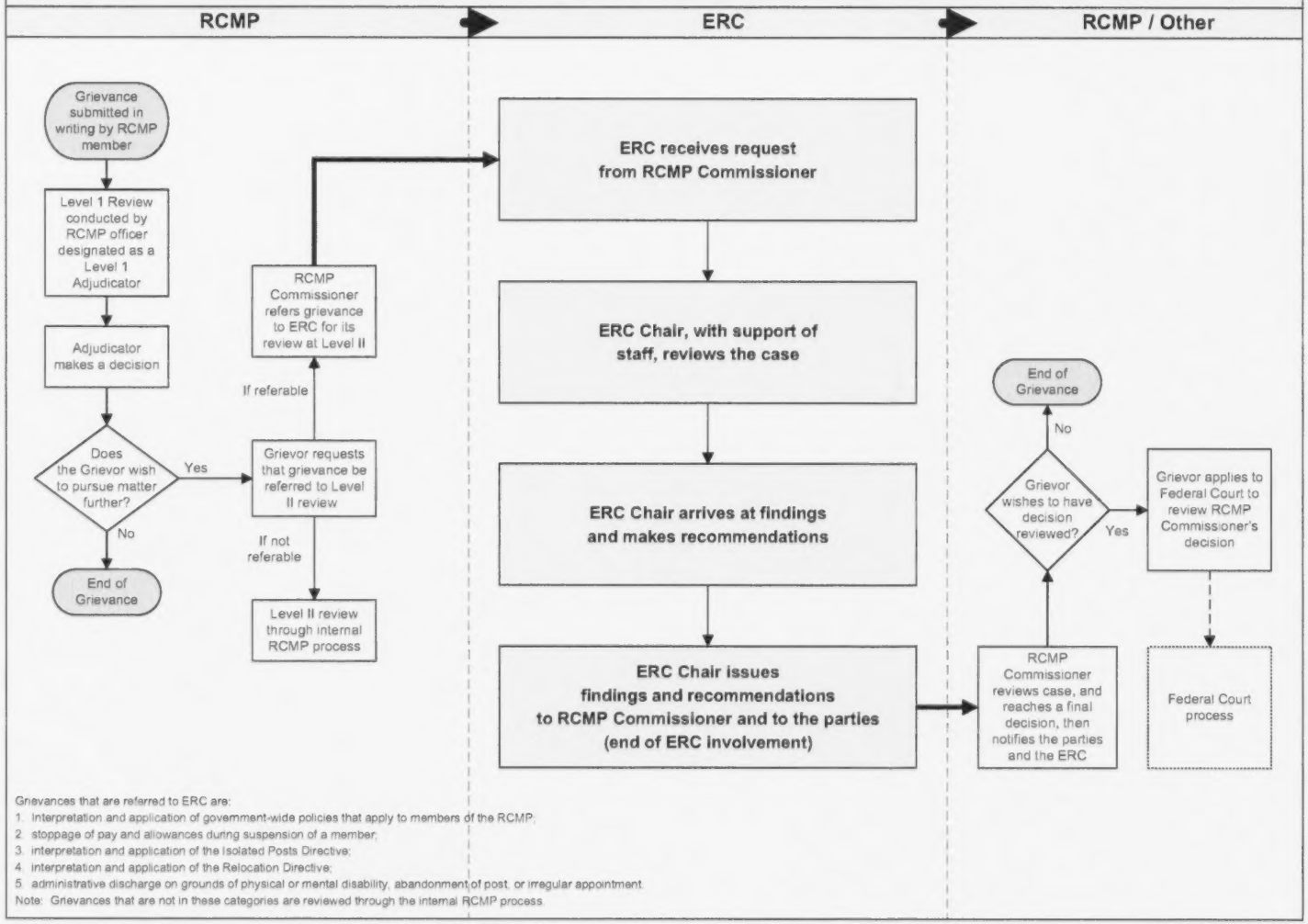
ERC Case Number	Subject Matter	ERC Recommendation
Disciplinary Appeals		
D-121	Appeal on merits and on sanction of resignation/dismissal. Allegation of sexual assault. Credibility of witnesses. Manifest and determinative error.	Allow the appeal. Find that the allegation was not established. Vary the sanction.
D-122	Appeal on merits and on sanction of resignation/dismissal. Allegation of misusing personal and confidential information to seduce the vulnerable spouse of a subordinate. Allegations of misusing RCMP property, and of misusing special police-use passport. Language of proceedings. Right to be present during hearing. Apprehension of mitigating and aggravating factors.	Allow the appeal on sanction. Vary the sanction to a reprimand and forfeiture of 10 days' pay.
D-123	Appeal on merits and on sanction. Allegation of sending unwanted, inappropriate, threatening text and voice messages; and, of conducting unauthorized information searches. Apprehension of bias. Procedural Fairness. Substantiation of factual findings. Rationale behind sanction.	Dismiss the appeal.

ERC Case Number	Subject Matter	ERC Recommendation
Grievances		
G-508	Harassment investigation. Definition of "harassment". Admissibility of new evidence.	Allow the grievance. Acknowledge that the Grievor was subject to workplace harassment. Apologize to the Grievor for the fact that the harassment investigation and decision were inconsistent with applicable harassment policies.
G-509	Time limits. Failure to provide government-owned housing in connection with a promotional transfer.	Deny the grievance. Undertake a review of the RCMP policy provision that restricts the Grievor's right to be heard in on preliminary issues at Level I.
G-510	Harassment complaint. Definition of harassment. Harassment test. Screening procedure. *Charter* - unreasonable delay.	Allow the grievance. Return the harassment complaint to be dealt with according to applicable policies. Alternatively, apologize to the Grievor for the fact that the Grievor's harassment complaint was not dealt with appropriately.
G-511	Harassment complaint. Definition of harassment. Harassment test. Screening procedure.	Allow the grievance. Return the harassment complaint to be dealt with according to applicable policies. Alternatively, apologize to the Grievor for the fact that the Grievor's harassment complaint was not dealt with appropriately.
G-512	Alleged violation of the *Charter*. Sick leave policy.	Deny the grievance.
G-513	Duty to accommodate disability. New position. Compassionate transfer.	Allow the grievance in part. Find that Force should have reopened the accommodation process and carried out a sufficient search of accommodation options after the new position did not work out. Find that, on the basis of the record alone, it is not possible to reach any further conclusions as to what decision should have been made. Apologize to the Grievor for the fact that the Force did not satisfy its duty to accommodate in the circumstances.

ERC Case Number	Subject Matter	ERC Recommendation
G-514	Harassment complaint. Harassment test. Right to be heard. Early Resolution participation.	Deny the grievance.
G-515	Harassment complaint. Harassment test. Right to be heard. Early Resolution participation.	Deny the grievance.
G-516	Operational restrictions. Medical profile.	Deny the grievance.
G-517	Time limits. Deployment to Olympic Games. Double Occupancy Accommodations. Approach to assessing grievance where Grievor does not file Level II submissions.	Deny the grievance.
G-518	Time limits. Decision to initiate *Code of Conduct* investigation.	Deny the grievance.
G-519	Time limits. Decision to initiate *Code of Conduct* investigation.	Deny the grievance.
G-520	Time limits. Decision to initiate *Code of Conduct* investigation.	Deny the grievance.
G-521	Harassment complaint. Procedural Fairness.	Allow the grievance. Return the matter to the Level I Adjudicator.
G-522	Time limits. Test for whether extension is warranted.	Deny the grievance.

ERC Case Number	Subject Matter	ERC Recommendation
G-523	Standing. Sufficient information. Procedural fairness. Identity of the responding party.	Allow the grievance. Overturn the Level I decision. Send the matter back to Level I. Instruct the Level I Adjudicator to request key documents, and to invite parties to file submissions on the issue of standing. Confirm that the responding party at Level II is the Respondent, or appoint another person to that role.
G-524	Time limits. Test for whether extension is warranted.	Deny the grievance.

1. RCMP Grievance Process and the Role of the ERC – Key Steps

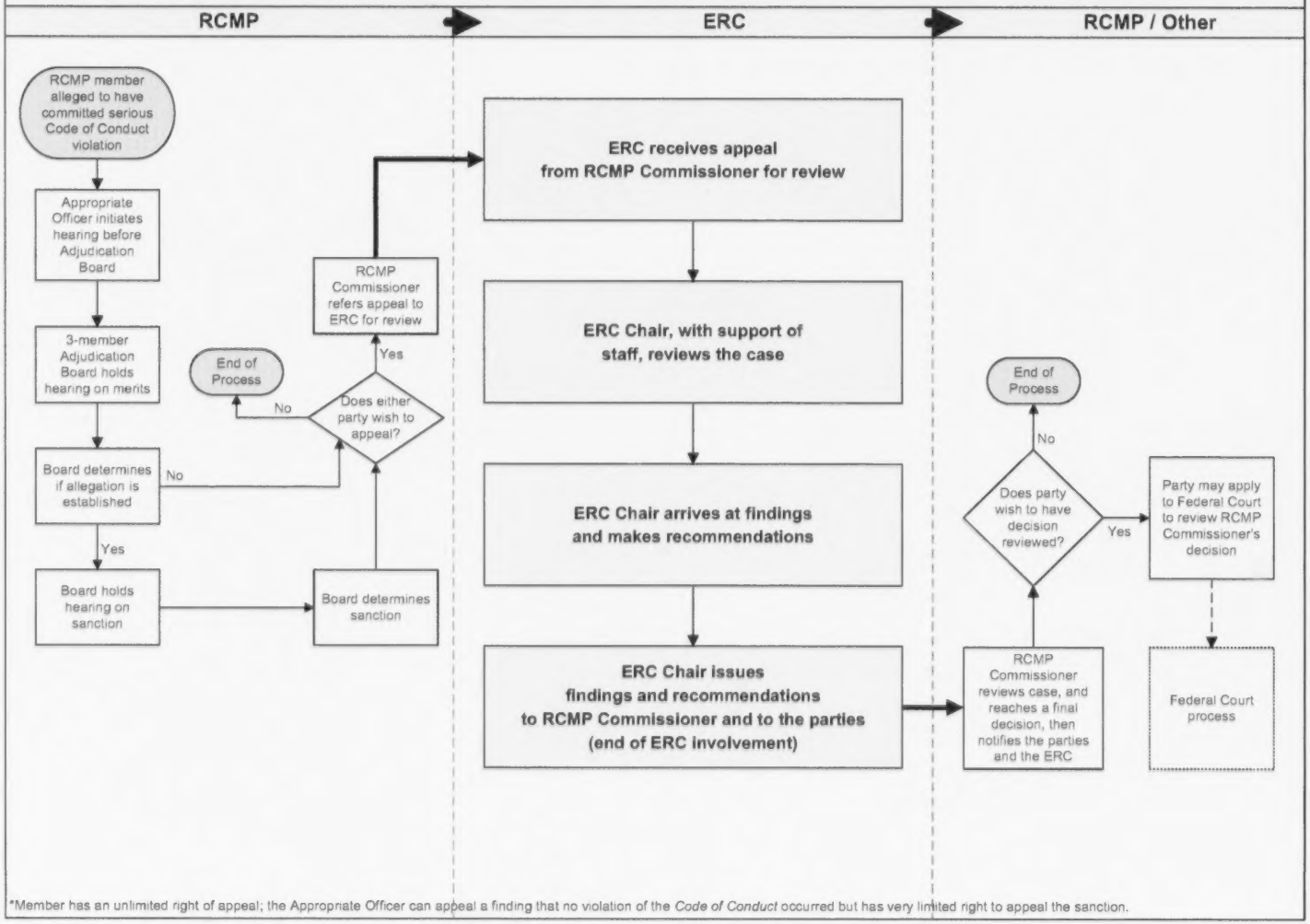

RCMP
ERC
RCMP / Other
Grievance submitted in writing by RCMP member
Level 1 Review conducted by RCMP officer designated as a Level 1 Adjudicator
Adjudicator makes a decision
Does the Grievor wish to pursue matter further?
Yes
No
End of Grievance
Grievor requests that grievance be referred to Level II review
If referable
If not referable
RCMP Commissioner refers grievance to ERC for its review at Level II
Level II review through internal RCMP process
ERC receives request from RCMP Commissioner
ERC Chair, with support of staff, reviews the case
ERC Chair arrives at findings and makes recommendations
ERC Chair issues findings and recommendations to RCMP Commissioner and to the parties (end of ERC involvement)
RCMP Commissioner reviews case, and reaches a final decision, then notifies the parties and the ERC
Grievor wishes to have decision reviewed?
No
Yes
End of Grievance
Grievor applies to Federal Court to review RCMP Commissioner's decision
Federal Court process

Grievances that are referred to ERC are:

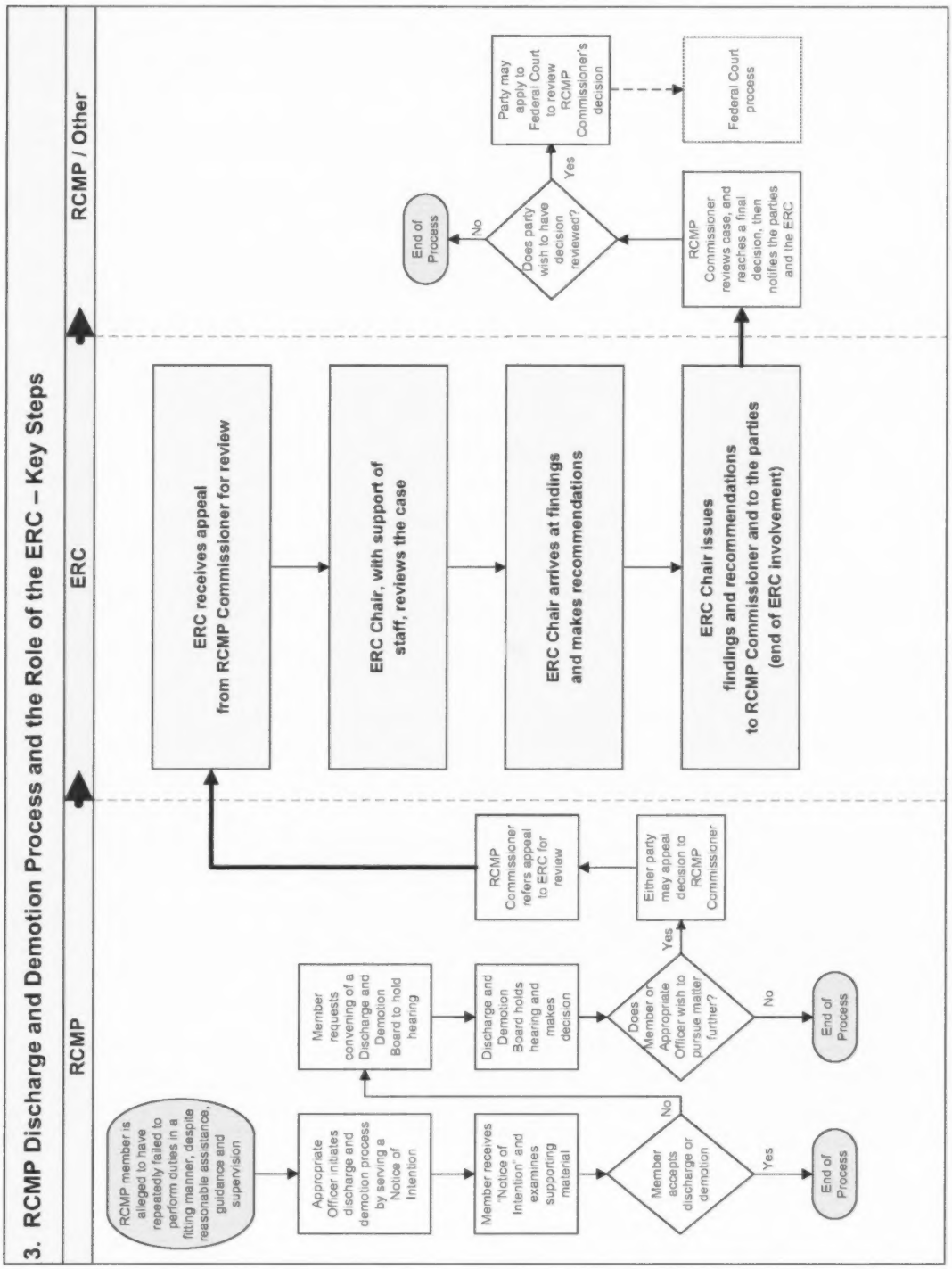
1. interpretation and application of government-wide policies that apply to members of the RCMP;
2. stoppage of pay and allowances during suspension of a member;
3. interpretation and application of the Isolated Posts Directive;
4. interpretation and application of the Relocation Directive;
5. administrative discharge on grounds of physical or mental disability, abandonment of post, or irregular appointment.

Note: Grievances that are not in these categories are reviewed through the internal RCMP process.

2. RCMP Disciplinary Process and the Role of the ERC – Key Steps


RCMP
ERC
RCMP / Other
RCMP member alleged to have committed serious Code of Conduct violation
Appropriate Officer initiates hearing before Adjudication Board
3-member Adjudication Board holds hearing on merits
Board determines if allegation is established
No
Yes
Board holds hearing on sanction
Board determines sanction
End of Process
Does either party wish to appeal?
No
Yes
RCMP Commissioner refers appeal to ERC for review
ERC receives appeal from RCMP Commissioner for review
ERC Chair, with support of staff, reviews the case
ERC Chair arrives at findings and makes recommendations
ERC Chair issues findings and recommendations to RCMP Commissioner and to the parties (end of ERC involvement)
End of Process
No
Does party wish to have decision reviewed?
Yes
Party may apply to Federal Court to review RCMP Commissioner's decision
RCMP Commissioner reviews case, and reaches a final decision, then notifies the parties and the ERC
Federal Court process

*Member has an unlimited right of appeal; the Appropriate Officer can appeal a finding that no violation of the *Code of Conduct* occurred but has very limited right to appeal the sanction.


3. RCMP Discharge and Demotion Process and the Role of the ERC – Key Steps
RCMP
ERC
RCMP / Other
RCMP member is alleged to have repeatedly failed to perform duties in a fitting manner, despite reasonable assistance, guidance and supervision
Appropriate Officer initiates discharge and demotion process by serving a Notice of Intention
Member receives 'Notice of Intention' and examines supporting material
Member accepts discharge or demotion
Yes
End of Process
No
Member requests convening of a Discharge and Demotion Board to hold hearing
Discharge and Demotion Board holds hearing and makes decision
Does Member or Appropriate Officer wish to pursue matter further?
Yes
Either party may appeal decision to RCMP Commissioner
No
End of Process
RCMP Commissioner refers appeal to ERC for review
ERC receives appeal from RCMP Commissioner for review
ERC Chair, with support of staff, reviews the case
ERC Chair arrives at findings and makes recommendations
ERC Chair issues findings and recommendations to RCMP Commissioner and to the parties (end of ERC involvement)
RCMP Commissioner reviews case, and reaches a final decision, then notifies the parties and the ERC
Does party wish to have decision reviewed?
No
End of Process
Yes
Party may apply to Federal Court to review RCMP Commissioner's decision
Federal Court process

History of the ERC

The RCMP External Review Committee (ERC) was created in response to recommendations in the 1976 *Commission of Inquiry Relating to Public Complaints, Internal Discipline and Grievance Procedure Within the Royal Canadian Mounted Police.* In 1986, as part of the Commission's call for an independent review mechanism in the area of labour relations within the RCMP, the ERC was formally established through Part II of the *Royal Canadian Mounted Police Act*. It became fully operational by 1988.

The Difference between the ERC and the CPC

The ERC and the Commission for Public Complaints Against the RCMP (CPC) were established at the same time to be independent bodies to oversee and review the work of the RCMP. The two organizations are independent from the RCMP and they are distinct from each other. The ERC reviews certain types of grievances and other labour-related appeals from within the RCMP, whereas the CPC examines complaints from the public against members of the RCMP. Both organizations play very important roles, as Justice O'Connor confirmed in the 2006 Arar Commission Policy Review Report, in maintaining public confidence in the RCMP and in ensuring that it respects the law and human rights.

The first Chair of the ERC was the Honourable Mr. Justice René Marin, who from 1974 to 1976 had chaired the *Commission of Inquiry Relating to Public Complaints, Internal Discipline and Grievance Procedure Within the Royal Canadian Mounted Police*. In 1993, the Vice Chair, F. Jennifer Lynch, Q.C., became Acting Chair, a position she held until 1998. Philippe Rabot then assumed the position on an acting basis and, on July 16, 2001, was appointed Chair of the ERC.

Upon Mr. Rabot's departure in April 2005, Catherine Ebbs assumed the role of Acting Chair of the ERC. A member of the Bar of Saskatchewan, Ms. Ebbs was a member of the National Parole Board for sixteen years, the last ten as Vice-Chair in charge of the Appeal Division of the Board. Ms. Ebbs joined the ERC in 2003, serving as Legal Counsel, and then as Executive Director/Senior Counsel, before becoming Acting Chair.

Ms. Ebbs was appointed as full-time Chair on November 1, 2005, for a three-year term. She was reappointed on November 1, 2008, for a second three-year term, and again for a further one-year period in November 2011.

The ERC produces a wide variety of research publications and reference materials, all of which are available to the RCMP and the general public at www.erc-cee.gc.ca.

ERC and its Staff in 2011-12*

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David Paradiso, Executive Director and Senior Counsel

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